

## **REMARKS**

In response to the above identified Reply Brief, the Applicant requests re-opening of the prosecution and entry of the above amendments. Reconsideration in view of the following remarks is also requested. Claim 1 has been amended. No claims have been added or cancelled. Claims 12-33 were previously withdrawn. Accordingly, claims 1-6 and 8-33 remain pending in the application.

### **I. Claims Rejected Under 35 U.S.C. § 101**

Claims 1-6 and 8-11 stand rejected under 35 U.S.C. § 101 as allegedly directed to non-statutory subject matter. The Applicant has amended claim 1 to recite “detecting a skipping of a range of the constraint and adjusting the simulating of the loading of the shipment by a computer system in a response to the skipping.” Thus, the claims as amended are tied to a particular machine and are therefore directed to statutory subject matter. Accordingly, reconsideration and withdrawal of the non-statutory subject matter rejection are requested.

### **II. Claims Rejected Under 35 U.S.C. § 103**

Claims 1-6 and 8-11 stand rejected under 35 U.S.C. § 103 as allegedly being unpatentable over U.S. Patent No. 6,937,992 by Benda, et al. (hereinafter “Benda”) in view of U.S. Patent Publication No. 2003/0014286 by Cappellini (hereinafter “Cappellini”) and in further view of U.S. Patent No. 3,970,832 by Itschner (hereinafter “Itschner”). The Applicant respectfully disagrees for the following reasons.

In regard to claim 1, the Applicant refers the Examiner to the arguments set forth in the Appeal Brief that are hereby incorporated by reference. In response to the Applicant's Appeal Brief, the Examiner stated in the Examiner's answer that "the examiner notes Itschner is not analogous art with respect to loading a shipment, however the element combined with Itschner is analogous to the idea of a skipping range during a simulation of a rule (e.g. Koch sate (*sic*) equation)." See page 10 of the Examiner's Answer. However, this statement clearly shows that the Examiner is misconstruing and mis-applying the relevant standard for determination of analogous art. In *KSR International Co. v. Teleflex, Inc.* 82USPQ2d 1385, 1397 (2007), the court stated that "[u]nder the correct analysis, any need or problem known in the field of endeavor at the time of the invention and addressed by the patent [or application at issue] can provide a reason for combining the elements in the manner claimed." The MPEP further clarifies "a reference in a field different from that of applicant's endeavor may be reasonably pertinent if it is one which, because of the matter with which it deals, logically would have commended itself to an inventor's attention in considering his or her invention as a whole." See MPEP § 2141.01(a) I, TO RELY ON A REFERENCE UNDER 35 U.S.C. § 103, IT MUST BE ANALOGOUS PRIOR ART.

The Examiner has not shown that the issue of skipping a range during a simulation of the loading of a shipment, which is the subject of the Applicant's invention and the recited claims, is a need or problem known in the field of endeavor at the time of the invention and further has not shown that Itschner would have commended itself to the inventor's attention in this field. Further, the Examiner's assertion that Itschner is analogous art is based on a limited aspect of the invention, which is also clearly shown to be improper in this section of the MPEP, because the

analysis should be based on a consideration of the invention as a whole. Thus, by the Examiner's own admission, Itschner is not analogous art to the invention as a whole. Therefore, Itschner is not properly combined with the other references to render the claims obvious.

The Examiner has further argued that he has provided "motivation for the combination of Itschner" stating that the "method by which data can be reproduced electrically by simple means with accuracy sufficient for control purposes over a relatively large range (see at least, Itschner, col. 1, lines 48-51)" which interpreted would relate to the idea of using an electrical simulation to provide accuracy for a given range of control." See page 11 of the Examiner's Answer. In so far as this statement can be understood, the Examiner appears to be taking the position that one skilled in the art would be motivated to combine Itschner with the other references to perform an electrical simulation over a given range of data. The Applicant has been unable to discern how this would be germane to the simulation of shipment loading, which has no patent correlation with electrical simulation. Thus, the Examiner has failed to clearly articulate a basis for establishing the obviousness of these claims because the Examiner has not established a motivation to combine the references.

The Examiner also appears to argue on page 11 of the Examiner's Answer that the combination of Itschner with Benda and Cappellini, would have been a routine combination with a predictable result. The Examiner states "one of ordinary skill in the art would have been able to realize that simulation via the use of ignoring a range of values (See Itschner, col. 2, lines 1-14) could be implemented into the simulation of loading a container for maximum capacity (see Cappellini, paragraphs [0183]-[0184])

and [0186]) and from such a combination obtain a predictable result.” However, this statement is entirely conclusory. As set forth above, and in the Appeal Brief, the Examiner has not articulated how one of ordinary skill in the art would have been aware of this problem, been exposed to Itchner due to it being in a non-analogous art, or how the method for obtaining an electrical signal corresponding to the enthalpy of steam expressed by Koch’s state equation disclosed by Itchner would have been incorporated into a load shipment simulator. The system of Itchner shares no common architecture or structure with the other references that would enable one skilled in the art to simply extrapolate and combine the aspects of Itchner that are being relied upon into those aspects of Cappellini and Benda that are being relied upon to produce a result that would read on the elements of the claims. Therefore, the Examiner has failed to establish a *prima facie* case of obviousness based on Benda in view of Cappellini and Itchner. Accordingly, reconsideration and withdrawal of the obviousness rejection of claims 1-33 are requested.

In regard to claims 2-6 and 8-11, these claims depend from independent claim 1 and incorporate the limitations thereof. Thus, at least for the reasons mentioned in regard to claim 1, these claims are not obvious over the cited references. Accordingly, reconsideration and withdrawal of the obviousness rejection of these claims are requested.

### CONCLUSION

In view of the foregoing, it is believed that all claims now pending patentably define the subject invention over the prior art of record, and are in condition for allowance and such action is earnestly solicited at the earliest possible date. If the Examiner believes a telephone conference would be useful in moving the case forward, he is encouraged to contact the undersigned at (310) 207-3800.

If there are any additional fees due in connection with the filing of this response, please charge those fees to our Deposit Account No. 02-2666.

Respectfully submitted,

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